STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON JAMES BUFORD,

Defendant-Appellant.

UNPUBLISHED
September 16, 2004

No. 246331
Wayne Circuit Court
LC No. 02-001844

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree felony murder, MCL 750.316(1)(b), two counts of assault with intent to commit murder, MCL 750.83, and arson of a dwelling house, MCL 750.72. He was sentenced to life imprisonment without parole for each of the felony murder convictions, and forty to sixty years' imprisonment for each of the assault convictions, to be served concurrently.[1] He appeals as of right. We affirm.

I

Defendant argues that the trial court erred in denying his motion to suppress his confession. We disagree.

This Court reviews a trial court's factual findings on a motion to suppress for clear error. To the extent that the trial court's ruling involves an interpretation of the law or the application of a constitutional standard to undisputed facts, review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). Thus, on appeal from a ruling on a motion to suppress a confession, deference is given to the trial court's factual findings; the record is reviewed de novo, but an appellate court will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998).

A statement of an accused made during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Before a

[1] The arson conviction was vacated.

challenged confession may be admitted as evidence, the prosecutor must establish by a preponderance of the evidence that the defendant waived his *Miranda* rights. *People v Daoud*, 462 Mich 621, 632-634; 614 NW2d 152 (2000). "Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that the court must determine under the totality of the circumstances." *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Court provided a nonexclusive list of factors to consider when determining whether a defendant voluntarily waived his rights:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated, or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

A review of the record in light of the factors listed in *Cipriano* discloses that the trial court did not err in determining that defendant voluntarily waived his *Miranda* rights. Specifically, the trial court found that Officer Simon's and Officer Fisher's accounts of the interview process were more credible than defendant's, and rejected defendant's allegations of physical abuse and a threatened execution. There is no indication that defendant was deprived of food, sleep, or medical attention. The totality of the circumstances, as found by the trial court, indicate that defendant understood his *Miranda* rights, voluntarily waived those rights, and voluntarily signed a statement in which he admitted that he started the fire. Accordingly, the trial court did not err in denying defendant's motion to suppress his confession.

II

Next, defendant argues that there was insufficient evidence of his intent to kill to support his two convictions of assault with intent to commit murder. We disagree.

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences drawn from the evidence can satisfactorily prove the elements of a crime. *Id*.; *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

To prove assault with intent to commit murder, the prosecutor must establish "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "The intent to kill may be

proved by inference from any facts in evidence." *Id*., citing *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996) "Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id.*, citing *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Under the doctrine of transferred intent, the prosecution had to show that defendant had the requisite state of mind to kill, not that his state of mind was directed at the victims of the charged assaults. As this Court explained in *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003), the "general intent to kill need not be directed at an identified individual or the eventual victim." Here, the evidence showed that, following an argument with his ex-girlfriend, Jameise Scaife, defendant poured gasoline throughout the stairwell of Scaife's occupied apartment building, opened the door to the fourth floor on which Scaife and her children lived, and ignited the gasoline. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant intended to kill Scaife, as well as the other residents on the fourth floor, including Scaife's two children. Further, under the doctrine of transferred intent, the evidence establishing that defendant intended to kill Scaife was sufficient to support his two convictions of assault with intent to commit murder with respect to her two children.

III

Next, defendant raises several claims of instructional error. We find no basis for reversal.

To begin, the trial court did not err by listing the "not guilty" option on the verdict form last. See *People v Cavanaugh*, 127 Mich App 632, 643; 339 NW2d 509 (1983).

Second, defendant argues that the trial court erred when it provided the jury with a set of written instructions setting forth the elements of the murder charges. The record does not contain the written material that the trial court provided to the jury, although it suggests that the material was limited to a writing setting forth the elements for the offenses of first- and second-degree murder. To the extent the written material encompassed only the elements of the murder charges, this would have been permissible under the first sentence of MCR 6.414(G), which expressly authorizes the court to "permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant[.]" But to the extent the court provided a partial set of written instructions encompassing more than the elements of the murder charges, over defendant's objection and without a request for clarification from the jury, the court would have erred under the second sentence of MCR 6.414(G).

Nonetheless, to warrant reversal, defendant must show that it is more probable than not that any error was outcome-determinative in the sense that it undermined the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001), citing *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000), and *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant does not assert that the writing provided by the trial court was inaccurate, nor does he explain how any error affected the outcome. In this circumstance, reversal is not required. See *People v Riley*, 156 Mich App 396, 402-403; 401 NW2d 875 (1986), overruled on other grounds *People v Lane*, 453 Mich 132 (1996) (reversal not required

where the defendant did not challenge the accuracy of written instructions or allege that the error was adverse to the legal process).

Defendant did not preserve his remaining claims of instructional error with an appropriate objection at trial. We review these unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 766-768; 597 NW2d 130 (1999). Additionally, reversal is warranted only if the plain error resulted in a conviction of an innocent defendant or the error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

This Court reviews jury instructions de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). The instructions are reviewed in their entirety to determine whether error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must not be 'extracted piecemeal to establish error.' Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*., quoting *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000), and *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). While defendant complains that the trial court did not use the standard jury instructions, it was not required to do so. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985).

With regard to the felony murder instruction, defendant contends that the trial court failed to define the elements of arson, which was the underlying felony for the felony murder charge, and that the court failed to inform the jury that, to find defendant guilty of felony murder, it had to find that each of the elements of arson were proven beyond a reasonable doubt. The trial court instructed the jury that, to find arson, it had to find that the "fire was intentionally set." Although the trial court failed to state that the intent element of arson may also be proved by showing that "the defendant intentionally committed an act that created a very high risk of burning a dwelling house, and that, while committing the act, the defendant knew of the risk and disregarded it (wanton arson)," *Nowack*, *supra* at 409, this omission benefited defendant because it required the prosecutor to prove the intent element solely on the basis that "defendant intended to do the physical act constituting the actus reus of arson, i.e., starting a fire or doing an act that results in the starting of a fire (intentional arson)." *Id*. Thus, any error in this regard did not affect defendant's substantial rights. Moreover, a review of the trial court's jury instructions in their entirety also shows that the court adequately explained the concept of malice. *People v Goecke*, 457 Mich 442, 464, 466; 579 NW2d 868 (1998).

Defendant also argues that the court's alibi instruction was inaccurate because it allowed the jury to find him guilty on the basis of his mere presence, thus minimizing the prosecution's burden of proving each element of the offenses beyond a reasonable doubt. We disagree. As a whole, the jury instructions adequately conveyed that the jury should convict defendant only if the prosecution proved beyond a reasonable doubt that he committed the charged crimes.

Defendant argues in a supplemental brief that the trial court's reasonable doubt instruction was erroneous because it effectively shifted the burden of proof. Considered in context, the trial court's statement that a reasonable doubt is a "a doubt for which you can assign a reason for having" should be understood as meaning that the doubt should be related to the evidence or lack

of evidence, not that the jurors had to articulate or justify the reason for having a doubt. Moreover, the trial court made clear that the prosecution, not defendant, bore the burden of proof beyond a reasonable doubt. Defendant has not shown a plain error affecting his substantial rights.

Finally, defendant challenges the trial court's statement that the jury had a duty to convict him if the prosecution proved beyond a reasonable doubt that he committed the charged offenses. As plaintiff points out, a defendant in Michigan is not entitled to an instruction on jury nullification and the jury does not have the right to disregard the court's instructions. *People v St Cyr*, 129 Mich App 471, 473-474; 341 NW2d 533 (1983). Considering that the jury has the corresponding obligation to follow the court's instructions and return a guilty verdict if the prosecution proves the defendant's guilt beyond a reasonable doubt, the trial court's reference to the jury's duty in this circumstance did not constitute plain error affecting defendant's substantial rights. See *People v Reichert*, 433 Mich 359, 364; 445 NW2d 793 (1989).

IV

Next, defendant argues that the trial court erred by refusing to allow a police officer to testify about a witness statement that referred to a tenant or tenants having observed three men running from the fire. This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996).

The trial court properly observed that the witness statement was inadmissible hearsay. MRE 801(c). Further, we disagree with defendant's suggestion that the statement was admissible under either MRE 803(1) (present sense impression) or MRE 803(2) (excited utterance). To qualify for admission under MRE 803(1), the declarant must have personally perceived the event, and the statement must have been made "substantially contemporaneous" with the event. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998). Here, the police officer merely testified that he had reviewed a witness statement. The record does not indicate when the witness statement was obtained, so there is no basis for concluding that the statement was made while the declarant was perceiving the event or immediately afterward. To qualify for admission under MRE 803(3), the statement must have been made while the declarant was under the stress of excitement caused by a startling event. *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999), aff'd 464 Mich 756 (2001). Here, there is no basis for concluding that the declarant was in an excited state when giving the statement. Accordingly, the trial court did not abuse its discretion by excluding the witness statement.

Alternatively, defendant argues that trial counsel was ineffective because he made no effort to produce the witnesses who allegedly saw some men running away from the fire. To show ineffective assistance of counsel, defendant must establish that counsel's performance "was below an objective standard of reasonableness under prevailing professional norms" and that "a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id*.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). But the

failure to interview witnesses alone does not establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). The defendant must show that the failure resulted in counsel's ignorance of important evidence that would have substantially helped the accused. *Id.* Similarly, the decision whether to call witnesses is presumed to be a matter of trial strategy, and to overcome the presumption of sound strategy, the defendant must show that counsel's failure to call a witness deprived him of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "A substantial defense is one that might have made a difference in the outcome." *Kelly*, *supra* at 526. The "defendant has the burden of establishing the factual predicate for his claim," and "[t]o the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record" that supports the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Here, the record does not contain any information indicating what efforts, if any, counsel made to investigate the existence of the witnesses in question, learn their identity, or determine what they saw. Therefore, there is no basis for concluding that defense counsel's performance fell below an objective standard of reasonableness. Furthermore, although defendant speculates that the "[p]resentation of the witnesses in question would have at least been the basis for an argument on reasonable doubt," the record is silent regarding the identity of the alleged witnesses and what in fact they would have testified about. In order to show that defense counsel was ineffective, it was incumbent upon defendant to factually support his claim that these witnesses existed, were available to testify, and could have given testimony that would have provided a substantial defense. Accordingly, defendant has failed to demonstrate that either reversal of his convictions or a remand for an evidentiary hearing is warranted.

V

Finally, defendant argues that the trial court departed from the sentencing guidelines on the basis of its inaccurate belief that the two assault victims were severely injured. We disagree.

Two witnesses were severely injured when they jumped from the fourth floor of their apartment building to escape the fire set by defendant. One witness broke her hip, pelvic bone, and back, and had undergone six surgeries, and the other witness suffered two broken vertebrae, hip fractures, a partially collapsed lung, nine chipped teeth, and a concussion. At one point during sentencing, the court mistakenly referred to the two assault victims as the persons who were severely injured. Later, however, when stating its reasons for departing from the sentencing guidelines range, the court recognized that it was "one of the witnesses," not the complainants, who was severely injured. Further, the significance of this factor was not the identity of the complainants, but that defendant's conduct had caused severe injuries to another person, a fact not in dispute. We therefore reject defendant's claim that he was sentenced on the basis of inaccurate information.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens